

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DANIEL GREER-WELLS,

Case No. 2:20-cv-0872-GMN-NJK

Plaintiff,

v.

T. MALONE, *et al.*,

SCREENING ORDER

Defendants.

10 Plaintiff, who is incarcerated in the custody of the Nevada Department of
11 Corrections (NDOC), has filed an application to proceed *in forma pauperis* (ECF No. 1)
12 and has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1-1).
13 Based on the information regarding Plaintiff's financial status, the Court will grant
14 Plaintiff's application to proceed *in forma pauperis*. The Court further finds that Plaintiff is
15 not able to pay an initial installment payment toward the full filing fee pursuant to 28
16 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the
17 full \$350.00 filing fee when he has funds available.

18 The Court now screens Plaintiff's civil rights complaint under 28 U.S.C. § 1915A.

I. SCREENING STANDARD

20 Federal courts must conduct a preliminary screening in any case in which a
21 prisoner seeks redress from a governmental entity or officer or employee of a
22 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
23 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
24 upon which relief may be granted or seek monetary relief from a defendant who is

1 immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings, however,
 2 must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
 3 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 4 elements: (1) the violation of a right secured by the Constitution or laws of the United
 5 States, and (2) that the alleged violation was committed by a person acting under color of
 6 state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

7 In addition to the screening requirements under § 1915A, pursuant to the Prison
 8 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner’s claim, if “the
 9 allegation of poverty is untrue,” or if the action “is frivolous or malicious, fails to state a
 10 claim on which relief may be granted, or seeks monetary relief against a defendant who is
 11 immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to
 12 state a claim upon which relief can be granted is provided for in Federal Rule of Civil
 13 Procedure 12(b)(6), and the court applies the same standard under §1915 when
 14 reviewing the adequacy of a complaint or an amended complaint. When a court
 15 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
 16 complaint with directions as to curing its deficiencies, unless it is clear from the face of the
 17 complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
 18 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

19 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
 20 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
 21 to state a claim is proper only if the plaintiff clearly cannot prove any set of facts in
 22 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
 23 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
 24 allegations of material fact stated in the complaint, and the court construes them in the

1 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
 2 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
 3 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
 4 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
 5 must provide more than mere labels and conclusions. See *Bell Atlantic Corp. v. Twombly*,
 6 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
 7 insufficient. *Id.*

8 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
 9 that, because they are no more than mere conclusions, are not entitled to the assumption
 10 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
 11 provide the framework of a complaint, they must be supported with factual allegations.”
 12 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
 13 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
 14 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
 15 specific task that requires the reviewing court to draw on its judicial experience and
 16 common sense.” *Id.*

17 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua
 18 sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
 19 includes claims based on legal conclusions that are untenable (e.g., claims against
 20 defendants who are immune from suit or claims of infringement of a legal interest which
 21 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 22 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
 23 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 **II. SCREENING OF COMPLAINT**

2 In his complaint, Plaintiff sues multiple defendants arising from an incident on
3 December 12, 2019, in which Plaintiff alleges he was assaulted by correctional officers at
4 Clark County Detention Center (CCDC). ECF No. 1-1 at 1, 5-9. Plaintiff sues Defendants
5 T. Malone (a peace officer), S. Hooks (a peace officer), J. Imperial (a peace officer), M.
6 Hilsabeck (a supervising peace officer), Joe Lombardo (sheriff of Clark County), and the
7 CCDC. Plaintiff asserts four counts and seeks monetary damages. *Id.* at 1, 12.

8 Plaintiff alleges the following. On December 12, 2019, Malone entered Plaintiff's
9 cell and threatened to physically assault him if he left his cell. *Id.* at 1, 5. Malone struck
10 Plaintiff in the head with a closed fist, almost knocking him unconscious. *Id.* at 5. Malone
11 continued the attack after Plaintiff fell to the ground. *Id.* Hooks joined the assault, striking
12 Plaintiff to the face and head with closed fists. *Id.* Other officers joined the assault. *Id.*

13 After the incident, Plaintiff was placed in a restraint chair. *Id.* The restraints were
14 extremely tight, causing Plaintiff extreme pain. *Id.* Plaintiff continues to suffer headaches
15 and sensitivity to light. *Id.* at 6.

16 Following the incident, Malone falsely reported that Plaintiff struck Malone and
17 Hooks multiple times. *Id.* at 8. Because of Malone's report, Plaintiff was charged with a
18 crime. *Id.* The charges were dismissed. *Id.* CCDC imposed sanctions on Plaintiff. *Id.*
19 Plaintiff continues to suffer sanctions in the custody of the NDOC, including placement in
20 maximum custody, as he is considered to be a "threat." *Id.*

21 Imperial and Hilsabeck did not intervene in the assault. *Id.* at 9. They failed to act
22 after being notified that Malone and Hooks had previously assaulted Plaintiff. Imperial
23 stated he reviewed the camera footage of the incident. *Id.*

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1 Based on these allegations, Plaintiff asserts that Defendants used excessive force,
2 were deliberately indifferent to the use of excessive force, assaulted him under state law,
3 and libeled him. *Id.* at 5-9. The Court liberally construes the complaint as bringing
4 Fourteenth Amendment claims for using excessive force, failure to protect, and falsely
5 reporting the incident, and state common law claims for assault and battery. The Court
6 will address each of these issues in turn.

7 **A. Defendant CCDC**

8 The Court must dismiss CCDC as a defendant. "The CCDC is an inanimate
9 building, not a person or entity subject to liability. The law defines persons as including
10 natural persons (*i.e.*, human beings) as well as corporations and political subdivisions.
11 However, objects such as buildings do not fit within this definition. Therefore CCDC, a
12 building, is not subject to liability." *Allen v. Clark Cnty. Det. Ctr.*, 2:10-CV-00857-RLH,
13 2011 WL 197201, *4 (D. Nev. Jan. 20, 2011). Accordingly, the Court will dismiss CCDC
14 with prejudice as amendment would be futile.

15 **B. Defendant Joe Lombardo**

16 Although Plaintiff has named Joe Lombardo as a defendant, he fails to state any
17 allegations in his complaint against him. Accordingly, the Court will dismiss Lombardo
18 without prejudice.

19 **C. Excessive Force**

20 The Fourteenth Amendment's Due Process Clause prohibits punishment of pretrial
21 detainees. *Vazquez v. Cty. of Kern*, 949 F.3d 1153, 1163 (9th Cir. 2020). "[T]he
22 Fourteenth Amendment is more protective than the Eighth Amendment 'because the
23 Fourteenth Amendment prohibits *all* punishment of *pretrial detainees*, while the Eighth
24 Amendment only prevents the imposition of *cruel and unusual* punishment of *convicted*

1 “*prisoners.*” *Id.* at 1163-64. A governmental action constitutes punishment if (1) the action
 2 causes the detainee to suffer “some harm or disability,” and (2) the purpose of the
 3 governmental action is to punish the detainee. *Id.* (internal quotations and citations
 4 omitted). The harm or disability constitutes punishment if the government’s action “either
 5 significantly exceed, or be independent of, the inherent discomforts of confinement.” *Id.*
 6 After harm is established, the court considers whether the harm imposed is “for the
 7 purpose of punishment or whether it is but an incident of some other legitimate
 8 governmental purpose.” *Id.*

9 In *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the Supreme Court held that a
 10 pretrial detainee states a claim for excessive force under the Fourteenth Amendment if:
 11 (1) the defendant’s use of force was used purposely or knowingly, and (2) the force
 12 purposely or knowingly used against the pretrial detainee was objectively unreasonable.
 13 *Id.* at 2472-73.

14 Plaintiff has stated a cognizable claim that Malone and Hooks used excessive
 15 force against him in violation of the Fourteenth Amendment. Plaintiff has alleged facts
 16 permitting a plausible inference that Malone and Hooks purposely or knowingly used
 17 force against Plaintiff, striking him with closed fists. Plaintiff has alleged sufficient facts to
 18 permit a plausible inference that this use of force was objectively unreasonable. The
 19 Court will permit this claim to proceed.

20 **D. Excessive Force – Supervisory Defendants**

21 A defendant is liable under 42 U.S.C. § 1983 “only upon a showing of personal
 22 participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A
 23 supervisor is only liable for constitutional violations of his subordinates if the supervisor
 24 participated in or directed the violations, or knew of the violations and failed to act to prevent

1 them. There is no respondeat superior liability under [§]1983." *Id.*; see also *Ashcroft v. Iqbal*,
 2 556 U.S. 662, 676 (2009) (holding that "[b]ecause vicarious liability is inapplicable to *Bivens*
 3 and § 1983 suits, a plaintiff must plead that each Government-official defendant, through
 4 the official's own individual actions, has violated the Constitution").

5 A pretrial detainee states a claim for failure-to-protect against an individual officer
 6 under the Fourteenth Amendment if: (1) the defendant made an intentional decision with
 7 respect to the conditions under which the pretrial detainee was confined; (2) those
 8 conditions put the pretrial detainee at substantial risk of suffering serious harm; (3) the
 9 defendant did not take reasonable available measures to abate that risk, even though a
 10 reasonable officer in the circumstances would have appreciated the high degree of risk
 11 involved—making the consequences of the defendant's conduct obvious; and (4) by not
 12 taking such measures, the defendant caused the pretrial detainee's injuries. *Castro v. Cty.*
 13 *of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016).

14 Plaintiff fails to state a cognizable claim against Defendants Imperial and
 15 Hilsabeck. Plaintiff fails to allege sufficient facts that these defendants, who are
 16 supervisors, participated in or directed the conduct of Malone and Hooks. Plaintiff's
 17 allegation that these Defendants did not intervene does not, standing alone, raise a
 18 plausible inference that these Defendants were aware the assault was occurring while it
 19 was occurring and thus could have acted to prevent the assault. Plaintiff has not alleged
 20 sufficient facts permitting a plausible inference that Imperial or Hilsabeck were aware of
 21 any facts suggesting either Malone or Hooks would engage in the conduct Plaintiff has
 22 alleged. The Court will dismiss this claim without prejudice with leave to amend.

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E. False Report of Incident

To state a cause of action for deprivation of procedural due process, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. *Sandin v. Conner*, 515 U.S. 472, 487 (1995). In *Sandin*, the Supreme Court held that a prisoner has a liberty interest when confinement “imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484. In *Sandin*, the Supreme Court focused on three factors in determining that the plaintiff possessed no liberty interest in avoiding disciplinary segregation: (1) disciplinary segregation was essentially the same as discretionary forms of segregation; (2) a comparison between the plaintiff’s confinement and conditions in the general population showed that the plaintiff suffered no “major disruption in his environment;” and (3) the length of the plaintiff’s sentence was not affected. *Id.* at 486-87.

When a protected liberty interest exists and a prisoner faces disciplinary charges, prison officials must provide the prisoner with (1) a written statement at least twenty-four hours before the disciplinary hearing that includes the charges, a description of the evidence against the prisoner, and an explanation for the disciplinary action taken; (2) an opportunity to present documentary evidence and call witnesses, unless calling witnesses would interfere with institutional security; and (3) legal assistance where the charges are complex or the inmate is illiterate. See *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974).

20 "When prison officials limit an inmate's efforts to defend himself, they must have a
21 legitimate penological reason." *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992). An
22 inmate's right to present witnesses may legitimately be limited by "the penological need to
23 provide swift discipline in individual cases . . . [or] by the very real dangers in prison life
24 which may result from violence or intimidation directed at either other inmates or staff."

1 *Ponte v. Real*, 471 U.S. 491, 495 (1985). Jail officials “must make the decision whether
 2 to allow witnesses on a case-by-case basis, examining the potential hazards that may
 3 result from calling a particular person.” *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir.
 4 2003). Despite this, an inmate has no right to cross-examine or confront witnesses in
 5 prison disciplinary hearings. See *Wolff*, 418 U.S. at 567-68.

6 “[T]he requirements of due process are satisfied if some evidence supports the
 7 decision by the prison disciplinary board.” *Superintendent, Massachusetts Corr. Inst.*,
 8 *Walpole v. Hill*, 472 U.S. 445, 455 (1985). However, this standard does not apply when a
 9 prisoner alleges that a prison guard’s report is false. *Hines v. Gomez*, 108 F.3d 265, 268
 10 (9th Cir. 1997).

11 The Fourteenth Amendment’s Due Process Clause prohibits jail and prison officials
 12 from “punishing” a pretrial detainee without a due process hearing. *Mitchell v. Dupnik*, 75
 13 F.3d 517, 524 (9th Cir. 1996). “[P]retrial detainees may be subjected to disciplinary
 14 segregation only with a due process hearing to determine whether they have in fact
 15 violated any rule.” *Id.*

16 Plaintiff has stated a cognizable claim that Defendant Malone violated his
 17 procedural due process rights by falsely reporting that Plaintiff violently initiated the
 18 incident, resulting in Plaintiff being subjected to disciplinary charges and sanctions. The
 19 Court will allow this claim to proceed.

20 **F. State Common Law Assault and Battery**

21 “To establish an assault claim, a plaintiff must show that the actor (1) intended to
 22 cause harmful or offensive physical contact, and (2) the victim was put in apprehension of
 23 such contact. To establish a battery claim, a plaintiff must show that the actor (1)

1 intended to cause harmful or offensive contact, and (2) such contact did occur." *Burns v.*
2 *Mayer*, 175 F. Supp. 2d 1259, 1269 (D. Nev. 2001) (internal citations omitted).

3 Plaintiff has stated cognizable state law claims for assault and battery against
4 Malone and Hooks. Plaintiff has alleged sufficient facts permitting a plausible inference
5 that both Malone and Hooks intended harmful physical contact, that this placed Plaintiff in
6 apprehension of such contact, and that the contact did occur. The Court will permit these
7 state law claims to proceed against Malone and Hooks.

8 **III. Leave to Amend**

9 Plaintiff is granted leave to file an amended complaint to cure the deficiencies of
10 the complaint. If Plaintiff chooses to file an amended complaint, he is advised that an
11 amended complaint entirely replaces the original complaint and, thus, the amended
12 complaint must be complete. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,
13 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that "[t]he fact that a party was named in the
14 original complaint is irrelevant; an amended pleading supersedes the original"); see also
15 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims
16 dismissed with prejudice, a plaintiff is not required to reallege such claims in a
17 subsequent amended complaint to preserve them for appeal). To be complete, an
18 amended complaint must contain all claims, defendants, and factual allegations that a
19 plaintiff wishes to pursue in his lawsuit. Moreover, an inmate should file the amended
20 complaint on this Court's approved prisoner civil rights form, and it must be entitled "First
21 Amended Complaint."

22 If Plaintiff chooses to file an amended complaint curing the deficiencies, as outlined
23 in this order, Plaintiff must file the amended complaint within 30 days from the date of
24 entry of this order.

If Plaintiff chooses to file an amended complaint, the Court will screen the amended complaint in a separate screening order. The screening process will take several months. If Plaintiff does not file an amended complaint curing the deficiencies outlined in this order, this action will immediately proceed on Plaintiff's Fourteenth Amendment due process claim against Malone and Hooks that they used excessive force against Plaintiff, on Plaintiff's Fourteenth Amendment procedural due process claim against Malone for falsely reporting the incident, subjecting Plaintiff to disciplinary charges and sanctions, and on Plaintiff's state common law claims against Malone and Hooks for assault and battery.

IV. Motion for Appointment of Counsel

Plaintiff has filed a motion for appointment of counsel. ECF No. 3. A litigant does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person unable to afford counsel.” However, the court will appoint counsel for indigent civil litigants only in “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983 action). “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved.’ *Id.* “Neither of these considerations is dispositive and instead must be viewed together.” *Id.* In the instant case, the Court does not find exceptional circumstances that warrant the appointment of counsel. The Court denies the motion for appointment of counsel without prejudice.

V. CONCLUSION

Therefore,

3 THE COURT ORDERS that Plaintiff's application to proceed *in forma pauperis*
4 (ECF No. 1) is GRANTED. The Court has allowed Plaintiff to commence and maintain
5 this action to conclusion without having to prepay fees or give security.

6 THE COURT FURTHER **ORDERS** that, as Plaintiff has commenced this civil rights
7 action, he is obligated to pay the full filing fee pursuant to 28 U.S.C. § 1915, as amended
8 by the Prisoner Litigation Reform Act.

9 THE COURT FURTHER ORDERS that, pursuant to 28 U.S.C. § 1915(b)(2), as
10 amended by the Prison Litigation Reform Act, the Plaintiff is required to make monthly
11 payments of 20% of the preceding month's income credited to his account (in months that
12 the account exceeds \$10.00). The Nevada Department of Corrections shall determine
13 and forward this monthly payment from the account of Plaintiff Daniel Greer-Wells, Inmate
14 No. 1169533, to the Clerk of the United States District Court, District of Nevada, in each
15 month that the account balance exceeds \$10.00 until the full \$350.00 filing fee has been
16 paid for this action. The Clerk of the Court will send a copy of this order to the Finance
17 Division of the Clerk's Office. The Clerk will send a copy of this order to the attention of
18 **Chief of Inmate Services for the Nevada Department of Corrections**, P.O. Box 7011,
19 Carson City, NV 89702.

20 THE COURT FURTHER ORDERS that, even if this action is dismissed, or is
21 otherwise unsuccessful, Plaintiff will remain obligated to pay the full \$350 filing fee
22 pursuant to 28 U.S.C. §1915, as amended by the Prisoner Litigation Reform Act, until it
23 has been paid. Further, this order granting *in forma pauperis* status to Plaintiff does not
24 extend to the issuance or service of subpoenas at government expense.

THE COURT FURTHER **ORDERS** that the Clerk of the Court file the complaint (ECF No. 1-1).

THE COURT FURTHER ORDERS that Count 1, Fourteenth Amendment due process claim against Malone and Hooks for using excessive force against Plaintiff, may PROCEED.

THE COURT FURTHER ORDERS that Count 2, Assault and Battery against Malone and Hooks, may PROCEED.

8 THE COURT FURTHER **ORDERS** that Count 3, Fourteenth Amendment
9 procedural due process claim against Malone for falsely reporting the incident may
10 PROCEED.

11 THE COURT FURTHER ORDERS that Count 4, Fourteenth Amendment due
12 process claim against Imperial and Hilsabeck is DISMISSED without prejudice with leave
13 to amend

14 THE COURT FURTHER **ORDERS** that Defendant Clark County Detention Center
15 is DISMISSED with prejudice as amendment would be futile.

16 THE COURT FURTHER **ORDERS** that Defendant Joe Lombardo is DISMISSED
17 without prejudice.

18 THE COURT FURTHER **ORDERS** that Plaintiff's Motion for Appointment of
19 Counsel (ECF No. 3) is DENIED without prejudice.

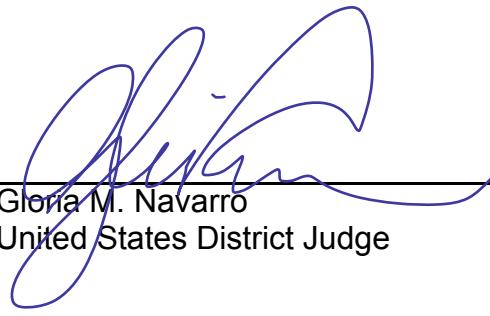
20 THE COURT FURTHER **ORDERS** that the Clerk of the Court send Plaintiff the
21 approved form for filing a § 1983 complaint, instructions for the same, and a copy of his
22 original complaint (ECF No. 1-1). If Plaintiff chooses to file an amended complaint, he
23 should use the approved form and he will write the words “First Amended” above the
24 words “Civil Rights Complaint” in the caption.

1 THE COURT FURTHER **ORDERS** that, if Plaintiff chooses to file an amended
2 complaint curing the deficiencies of his complaint, as outlined in this order, Plaintiff must
3 file the amended complaint within 30 days from the date of entry of this order.

4 THE COURT FURTHER **ORDERS** that, if Plaintiff chooses to file an amended
5 complaint, the Court will screen the amended complaint in a separate screening order.
6 The screening process will take several months.

7 THE COURT FURTHER **ORDERS** that, if Plaintiff does not file an amended
8 complaint curing the deficiencies outlined in this order, this action will immediately
9 proceed on Plaintiff's Fourteenth Amendment due process claim against Malone and
10 Hooks that they used excessive force against Plaintiff, on Plaintiff's Fourteenth
11 Amendment procedural due process claim against Malone for falsely reporting the
12 incident, subjecting Plaintiff to disciplinary charges and sanctions, and on Plaintiff's state
13 common law claims against Malone and Hooks for assault and battery.

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15 DATED THIS 21 of April 2021

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Gloria M. Navarro
United States District Judge

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